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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND
THE INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS (INTERTANKO),
Petitioners,

v.

GARY LOCKE ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INTERNATIONAL CHAMBER OF SHIPPING AND THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY CLUBS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* [1]

Formed in 1921, the International Chamber of Shipping ("ICS") is the trade association for the international shipping industry. Its membership comprises shipowners' associations and shipping companies from thirty-nine countries (including the

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

United States and Canada), representing more than half of the world's merchant shipping tonnage.[2]

Since 1961, ICS has held consultative status before the International Maritime Organization ("IMO"), the United Nations agency responsible for safety of life at sea and pollution prevention.[3] In that capacity, as the principal voice of the international shipping industry, ICS has actively participated, along with the United States and other interested nations, in the formulation of numerous international treaties and conventions promoting both maritime safety and environmental protection. Those treaties and conventions include the International Convention for the Safety of Life at Sea, 1974, and its Protocol of 1978 ("SOLAS"); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 ("STCW"), and the 1995 amendments thereto; and the International Convention for the Prevention of Pollution from Ships, 1973, and its 1978 Protocol ("MARPOL"). These treaties are subject to continuing amendment under the auspices of the IMO.

The International Group of Protection and Indemnity Clubs also holds consultative status before the IMO. It consists of fourteen nonprofit, mutual insurance companies ("the Clubs") which insure the liabilities of their shipowner members. Together the Clubs insure the liabilities of over 95% of the world's ocean

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[2] The full members of ICS are the shipowners' associations of Argentina, Australia, Austria, Barbados, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, Kuwait, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Russia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The associate members represent shipowners in Abu Dhabi, India, Jordan, and Panama.

[3] Consultative status is granted by the IMO only to organizations which "can reasonably be expected to make significant contribution to the work of" the IMO, and which "are truly international and are active and effective in their field." IMO Guidelines on the Grant of Consultative Status.

going merchant fleet, including effectively all oil tankers and almost all dry cargo ships trading to the United States. The Clubs are linked by reinsurance arrangements covering the larger liability risks of shipowners worldwide. They are actively involved in claims handling for their shipowner members, including the appointment of lawyers, surveyors, and other experts, and the swift settlement of claims.

The State of Washington regulations at issue in this case impose new, localized requirements on U.S. and foreign tank-vessel operations, equipment, staffing, and personnel training. The regulations are enforced through fines, penalties, and the exclusion of vessels from ports in the State of Washington. They fly in the teeth of the obligations of the United States under SOLAS and STCW to allow unhindered access to U.S. ports and transit through U.S. waters to all vessels that comply with these international regimes. Such unilateral measures by local authorities of a major coastal nation threaten the integrity of the international treaty regime in which *amici curiae* and their members have a huge stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

In our view this case turns entirely on the meaning of § 1018 of the Oil Pollution Act of 1990 ("the OPA"), 33 U.S.C. § 2718, and in particular on the meaning of the word "requirements" therein. The presence of that word in § 1018 permitted the Ninth Circuit to rule that Congress intended to authorize the States *and their political subdivisions* to enact "oil-spill prevention rules," and thus directly to regulate instruments of foreign commerce, in an area fraught with national foreign policy concerns and historically governed by federal statutes implementing international agreements. U.S. Pet. App. at 11a.[4]

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[4] Section 1018(a) provides in relevant part that "Nothing in this Act * * * shall * * * be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to" the discharge of oil or removal activities in connection with such a discharge. Section 1018(c) says the

We believe that construction of § 1018 to be demonstrably incorrect for a host of reasons that show, instead, that Congress in § 1018 meant only to maintain the status quo allowing the states to set their own financial liability standards for oil pollution incidents. Those reasons include –

(1) that § 1018 appears in Title I of the OPA, which is entitled "Oil Pollution Liability and Compensation" and refers not only to "this Act" but also to the Act of March 3, 1851, 46 U.S.C. App. § 183, a limitation of liability statute, and to 26 U.S.C. § 9509, which creates the Oil Spill Liability Trust Fund, all of which suggests that § 1018 should be restricted to liability standards;

(2) that the presence of non-preemption "savings" clauses in other OPA Titles (including Title IV, dealing with the prevention of oil spills), would be superfluous if § 1018 is read to reach all of the OPA;[5]

(3) that § 310 of Senate Bill 686, which would have explicitly authorized the states to regulate tanker safety, was deleted by the Conference Committee;[6]

(4) that Congress endorsed and intended the OPA to have no impact on *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 177

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same with respect to "the authority of the United States or any State or political subdivision thereof * * * to impose additional liability or additional requirements * * * relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. § 2718.

[5] See § 4202(c) (Title IV), § 5002(n) (Title V), and § 8202 (Title VIII), codified respectively at 33 U.S.C. §§ 1321(o)(2) and 2732, and 43 U.S.C. § 1656(e).

[6] That provision stated: "Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers in State waters." See 135 Cong. Rec. 18,745 (1989).

(1978),[7] which held among other things that, in enacting Title I of the Ports and Waterways Safety Act of 1972, Congress intended "that there would be a single decisionmaker, rather than a different one in each State," for the promulgation of safety standards applicable to tankers entering U.S. ports;

(5) that the word "requirements," the *sine qua non* of the Ninth Circuit's ruling that § 1018 permits the states to legislate with respect to vessel staffing and operational "requirements" to prevent spills, was intended by Congress to refer to *financial responsibility* requirements, a construction which harmonizes the term "requirements" with its surroundings and which the Conference Committee understood to be correct;[8]

(6) that the United States has never ratified any of the international conventions concerning financial liability for maritime environmental accidents,[9] making it all the more plausible that Congress would continue to permit the States to act in this area; and finally,

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[7] See H.R. Conf. Rep. No. 101-653, at 122 (1990), *reprinted in* 1990 U.S.C.C.A.N. 800: "The Conference substitute does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Company*, 435 U.S. 151 (1978)."

[8] See H.R. Conf. Rep. No. 101-653, at 121–122 (1990), *reprinted in* 1990 U.S.C.C.A.N. 799–800:

> "Both [Senate and House versions] preserve the authority of any State to establish or maintain funds for cleanup or compensation purposes and to collect any fees or penalties imposed under State law. Both provisions also authorize States to enforce *the financial responsibility requirements* of this Act on their own navigable waters." (Emphasis added.)

States may have reason to impose financial responsibility requirements on vessel operators not only for a discharge but also for a "substantial threat of a discharge," see § 1018(c), in circumstances where, for example, a ship founders, collides with another ship, or runs aground, and requires rescue operations for which it must bear financial responsibility.

[9] See *infra* p. 10 note 19.

(7) that § 1018 must be construed in the context of an international regime of treaties and conventions governing maritime safety and environmental protection, a regime in which the United States has played a pivotal role and which imposes compliance duties on the United States with which the Washington regulations interfere.

Amici will focus on this last point. We show in Part I below that the United States, actively participating through the International Maritime Organization, has been a leading party to the enormous recent growth in the establishment of international treaties and conventions setting comprehensive standards for vessel operations and crew competence as well as design and construction. Contrary to the view of the Ninth Circuit, the federal government's authority to construe and implement its treaty obligations, and its power even to enact legislation that is arguably inconsistent with international standards, offers no justification for the conclusion that Congress has forsaken the need for international regulation of the maritime industry and the ability of the United States to speak with one voice in the international maritime community.

In Part II we show in closer detail that treaties to which the United States is a party require the United States to accept certifications of vessel compliance with international standards issued by the vessels' so-called "flag states." Those treaties carefully govern the circumstances under which the United States may deny entry to or detain certificated vessels. If allowed to stand, the Washington State regulations would put the United States in violation of those treaties, jeopardize its ability to exercise its foreign affairs power so as to achieve and maintain international consensus on marine environmental protection measures, and significantly burden the international shipping community.

In sum, a sound consideration of the background of the United States' vigorous and sustained support for international standards, and its resultant treaty obligations, confirms the teaching of the other congressional indicia mentioned above—that Congress in

passing the OPA did not intend to authorize every coastal state—and their political subdivisions—to clutter the international maritime stage with independently enforceable standards for U.S. and foreign flag vessel staffing, training, and operations. Not a whisper in the legislative history of the OPA hinted at so fundamental a reallocation of federal-state powers in the international arena. Indeed, Congress expressly *rejected* a provision which would have permitted state regulation of tanker safety. See p. 4 & note 6, *supra*. Accordingly, the Ninth Circuit erred in refusing sensibly to interpret the word "requirements" in § 1018 to mean financial responsibility requirements, not vessel operations requirements, and in attributing to Congress the intent to invite treaty violations and frustrate the ability of the United States to conduct its foreign affairs. Its decision should be reversed.

ARGUMENT

I

International Conventions To Which The United States Is A Party Have Established Comprehensive Standards For Vessel Operation, Crew Competence, Construction, And Design.

As the Court has recognized, in Title II of the Ports and Waterways Safety Act of 1972 ("PWSA"), Pub. L. No. 92-340, 86 Stat. 424, Congress entrusted to the Secretary of Transportation "the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978). In reaching that conclusion the Court relied in part on the PWSA legislative history stating Congress' view "'that multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards.'" *Id.* at 166 n.16 (quoting S. Rep. No. 92-724, at 23 (1972)). In part because of this "expressed * * * preference for international action," the Court held that

Congress had left "no room" for the States to act with respect to the design and construction regulations at issue in that case. *Id.* at 167–68.

Events since *Ray* only demonstrate the continuing—indeed the increasing—United States commitment to the regulation of the worldwide shipping industry through international agreements—with respect not only to design and construction but also to operations and crew training.

A. International Shipping Standards Have Proliferated In Recent Years.

Recent international efforts have produced an enormous growth in conventions, protocols, and other treaties intended to prevent and remediate marine pollution and protect the safety of life and property at sea. This body of treaty law—most of which has been completed and become effective in the past twenty-five years—consists of hundreds of pages of regulations and standards governing the international shipping industry, covering operating standards, management practices, and seafarer qualification and training, as well as vessel design and construction.

In the early 1970's, the international community had agreed on initial versions of three of the principal conventions governing the maritime industry today: (1) the 1972 Convention on the International Regulations for Preventing Collisions at Sea ("COLREGS"),[10] which established navigational rules and safety standards for ships; (2) the 1973 International Convention for the Prevention of Pollution from Ships ("MARPOL"),[11] which established operation, design, and equipment requirements to prevent marine pollution; and (3) the 1974 International Convention for the Safety of Life at Sea ("SOLAS"),[12] which

[10] 28 U.S.T. 3459, 1050 U.N.T.S. 16, as amended, 35 U.S.T. 575, 1323 U.N.T.S. 353, *reprinted in* 6 Benedict on Admiralty Doc. No. 3-4 (7th rev. ed. 1999).

[11] 34 U.S.T. 3407, 1313 U.N.T.S. 3 (entered into force Mar. 30, 1983).

[12] 32 U.S.T. 47, 1184 U.N.T.S. 2 (entered into force May 25, 1980).

established safety requirements for vessel design, construction, and equipment.

Extensive Protocols to both SOLAS and MARPOL, setting forth the great bulk of the substantive standards that these Conventions contemplated, were completed in 1978, the year that *Ray* was decided.[13] To sharpen the SOLAS Convention's focus on preventing marine pollution, it was further amended in 1994 to require vessel operators to implement safety management systems in compliance with an International Safety Management Code ("ISM Code"). See SOLAS Annex Ch. IX.[14]

The primary convention directed at seafarer qualification, certification, training, and operational practices, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ("STCW"), was completed in initial form in 1978.[15] As with SOLAS and MARPOL, the majority of the substantive standards established under the STCW appear later, in a "Code" adopted in 1995. The STCW Code spans approximately 260 printed pages and includes both mandatory provisions (Part A) and advisory standards that the parties are encouraged to use in implementing the Convention's requirements (Part B).[16]

[13] 17 I.L.M. 546 (1978), 1340 U.N.T.S. 61 (1978 MARPOL Protocol) (entered into force Oct. 2, 1983). The current version of MARPOL, together with its 1978 Protocol, is reprinted at 6A Benedict on Admiralty Doc. No. 6-1. The 1978 SOLAS Protocol appears at 32 U.S.T. 5577, 1226 U.N.T.S. 237 (entered into force May 1, 1981).

[14] The current version of SOLAS, together with the 1978 Protocol and later amendments, is reprinted at 6D Benedict on Admiralty Doc. No. 14-1. The ISM Code is reprinted at *id.* Doc. No. 14-2.

[15] S. Exec. Doc. No. 96-1 EE (1979), 1361 U.N.T.S. 2 (entered into force Apr. 28, 1984, for the United States Oct. 1, 1991).

[16] The current version of the STCW Convention and Annex, as amended, is reprinted at 6D Benedict on Admiralty Doc. No. 14-6. The STCW Code, however, does not appear there; it appears at <http://www.amsa.gov.au/imo/secure/codes-conventions/code-stcw-at2.html>.

Finally, in 1994, the 1982 United Nations Convention on the Law of the Sea went into effect.[17] That Convention is an umbrella agreement that, among other things, requires regional and global cooperation to formulate international rules and standards to prevent, reduce, and control pollution from vessels.

SOLAS, STCW, MARPOL, COLREGS, and the Law of the Sea Convention are the principal conventions governing maritime safety and environmental protection.[18] The existence and widespread acceptance of these conventions and codes—which are subject to ongoing review and revision—demonstrates the desire of the international maritime community to address the safe operation of cargo and tanker vessels at the international level, rather than leaving it to independent regulation by the various coastal states of the world.[19]

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[17] S. Treaty Doc. No. 103-39 at 99 (1994), 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994), *reprinted in* 6C Benedict on Admiralty Doc. No. 10-6.

[18] For an excellent description of the history and basic import of these treaties and conventions, see Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar. L. & Com. 565 (1998).

[19] The international community has also adopted international rules on liability for vessel pollution. The 1969 International Convention on Civil Liability for Oil Pollution Damage imposed strict liability on vessel owners, limited liability, specified recoverable damages, and required insurance. 973 U.N.T.S. 3, *reprinted in* 6A Benedict on Admiralty Doc. No. 6-3. The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage provided a limited fund for damages not compensable by the vessel owner or by insurance. 1110 U.N.T.S. 57, *reprinted in* 6A Benedict on Admiralty Doc. No. 6-8. Later protocols have increased the monetary limits. See *id.* Doc. Nos. 6-4, 6-4A, 6-4B, 6-9, 6-9A, and 6-9B. Consistent with its long-standing view that these limits are too low, and its decision to permit the individual states to impose their own damage and liability statutes for pollution from ships, see, *e.g.*, OPA § 1018, the United States has not ratified these conventions.

B. The United States' Role In And Preference For The International Regime.

Almost all of the international efforts described above have occurred under the auspices of the International Maritime Organization ("IMO"), the United Nations' specialized agency responsible for "encourag[ing] and facilitat[ing] the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships."[20] It "has sponsored some forty international conventions, protocols, and other treaties, as well as hundreds of international codes and recommendations."[21]

From the beginning the United States has served on the IMO Council, its elected executive body, and has played an active role in the IMO and in the adoption and implementation of the standards agreed upon in IMO conventions. That role has been consistent with the United States' position as an "outspoken supporter of international conventions which set international standards for vessel safety and pollution prevention." Allen, *supra* note 10, at 578.

The United States has also implemented internationally adopted standards into its own domestic law, in accordance with the international regime. Thus, the United States is a party to the 1972 COLREGS Convention and has implemented its requirements in 33 C.F.R. Parts 80–82. It is also a party to the 1973 MARPOL Convention and has implemented many of the MARPOL requirements applicable to tanker vessels in the Port and Tanker Safety Act of 1978 ("PTSA"), see 46 U.S.C. Ch. 37, and in Coast Guard regulations, see 33 C.F.R. Parts 151, 155, 157,

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[20] See Convention on the Intergovernmental Maritime Consultative Organization, Pt. I, Art. 1(a), 9 U.S.T. 621, 289 U.N.T.S. 3 (1948), as amended, *reprinted in* 6C Benedict on Admiralty Doc. No. 12-1.

[21] Allen, *supra* note 18, at 579. Many of the IMO-sponsored conventions are collected in 6D and 6E Benedict on Admiralty Ch. XIV (7th rev. ed. 1999).

158, establishing standards for the design, equipment, and operations of oil tank vessels.

The United States is a party to the SOLAS Convention and has implemented its requirements for U.S.-flag vessels in various provisions of Titles 33 and 46 of the U.S. Code and in many Coast Guard regulations. Among other things, Congress in 1996 directed the Secretary to prescribe regulations consistent with the new International Safety Management Code adopted in the 1995 amendments to the SOLAS Convention,[22] and the resulting Coast Guard regulations appear at 33 C.F.R. Part 96.

The United States is also a party to the STCW Convention and its 1995 amendments. The amendments (including the STCW Code) were implemented in Coast Guard regulations effective July 28, 1997. 62 Fed. Reg. 34,506 (June 26, 1997) (interim rule with request for comments), amending 46 C.F.R. Parts 10, 12, and 15.

The United States initially declined to become a party to the Law of the Sea Convention because it disagreed with the Convention's provisions concerning deep-sea mining. In 1994, however, an agreement was reached ameliorating the United States' concerns, and the President submitted the amended Convention to the Senate for ratification. S. Treaty Doc. No. 103-39 (1994) (agreement also reprinted in 6C Benedict on Admiralty Doc. No. 10-6A). The United States had previously declared its intent to follow most provisions of the Convention (since they codify principles of customary international law that the United States accepts), and the President's message in 1994 stated that the United States "intends to apply the agreement provisionally pending ratification." S. Treaty Doc. No. 103-39, at VIII.

The United States' implementing statutes and regulations we have just discussed overwhelmingly reflect internationally agreed-upon standards, in accordance with the United States' continuing

[22] See 46 U.S.C. § 3203 (Supp. III 1997), added by § 602(a) of the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3928.

commitment to the international regime. See, *e.g.*, S. Treaty Doc. No. 103-39, at III ("The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea."); *Harmonization With International Safety Standards*, 61 Fed. Reg. 58,804 (Nov. 19, 1996) (notice of proposed rulemaking) (Coast Guard's goal is to "harmonize Coast Guard regulations with international safety standards"); 62 Fed. Reg. 51,188 (Sept. 30, 1997) (final rule) (amending numerous parts of C.F.R. Titles 33 and 46).

C. The Ninth Circuit Erroneously Belittled The Commitment Of The United States To Uniform International Standards.

In its earlier decision in *Chevron U.S.A., Inc.* v. *Hammond*, 726 F.2d 483, 493–94 (9th Cir. 1984), the Ninth Circuit ruled that Congress believes "that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction." The Ninth Circuit repeated that conclusion in its decision upholding all but one of the Washington regulations at issue here. U.S. Pet. App. at 17a–19a. The court's view was based on what is now 46 U.S.C. § 3703(a), which authorizes the Secretary to prescribe regulations for the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tanker vessels and states that the Secretary "may prescribe regulations that exceed standards set internationally."[23] See 726 F.2d at 493–94.

In some circumstances the international regime itself permits nations to implement somewhat varying standards—particularly

[23] Section 3703(a) is a successor to a provision enacted by § 5 of the PTSA, Pub. L. No. 95-474, 92 Stat. 1483, formerly codified at 46 U.S.C. § 391a(6).

within their territorial waters.[24] Section 3703(a) thus authorizes the Secretary, when he or she can do so consistent with the United States' treaty obligations, to enact specific standards that may differ from international norms.[25] It does not follow, however, that the coastal states and their political subdivisions may independently decide to enact standards that differ from international norms, regardless of treaty obligations, or that the United States is not fully committed to the establishment of uniform national regulation in essential accord with international standards. Indeed, the authorization that permits the Secretary to exceed international standards is most consistent with a congressional intent that *only* the Secretary may do so.

It is one thing for the United States to enact, in select circumstances, a requirement that may differ from international norms. The United States is a principal participant in the international shipping regime. Its views have special weight and

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[24] See, *e.g.*, SOLAS Annex, Ch. V, Reg. 13 (providing guidelines for nations to follow in setting vessel-specific manning requirements); Law of the Sea, Pt. XII, Sec. 5, Art. 211 Paras. 3–6 (permitting parties to adopt and apply special laws and requirements in some circumstances).

[25] Treaties such as SOLAS and the STCW may require international uniformity in many respects. In our view it is highly doubtful whether § 3703(a) can be construed to permit the United States to impose standards different from those mandated in treaties to which the United States is a party, for Congress would not lightly authorize violation of an international agreement. Hence it is reasonable to construe § 3703(a) *not* to authorize the Secretary to do so. That construction is particularly appropriate with respect to SOLAS, the current version of which entered into force in 1980, two years after enactment of the PTSA, see U. S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1999*, at 415 (available at <http://www.acda.gov/state>), and with respect to STCW, which entered into force for the U.S. in 1991, *see id.* at 416, thirteen years after the PTSA. It makes little sense to interpret a congressional provision to authorize the violation of treaties that have not yet been ratified or approved by the United States, especially since treaties supercede previously enacted statutes. See Restatement (Third) of the Foreign Relations Law of the United States § 115 (1987).

may be taken by the international community as persuasive evidence that the standard in question permits or should be changed to adopt such a requirement. Moreover, the United States—which will have to respond to any protests that might ensue—is in a position to gauge the international consequences of its actions, and to balance our overall domestic interests against any international repercussions.[26]

It is quite another thing for one of many coastal states of the United States, or the political subdivisions thereof, to take such action. The individual states and their political subdivisions have not been formal participants in developing the international regime. Their views do not necessarily represent but indeed may conflict with the views of the United States. Indeed, different coastal states and their political subdivisions may adopt different and even conflicting requirements among themselves. In short, whatever powers § 3703(a) may be seen to have conferred on the United States, that provision should not be seen as evincing a lack of U.S. support for the international regime, least of all as support for the conclusion that Congress intended a state-and-municipality-led Balkanization of regulatory requirements within the United States as well as in the international community.

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[26] After due consideration of these factors, for example, the United States has required certain foreign tankers entering United States waters to be double-hulled. See 46 U.S.C. § 3703a, added by OPA § 4115(a). The United States then declined to accept the amendments to the MARPOL Convention that would have required it to accept vessels that did not meet the federal double-hull requirement. See 56 Fed. Reg. 44,051–52 (Sept. 6, 1991). It thereby ensured—as MARPOL permitted—that the conflicting amendment would not enter into force in the United States, while the United States remained a party to the remaining aspects of the MARPOL regime. See MARPOL Art. 16(4)(b) ("Any party which has declined to accept an amendment to an Annex shall be treated as a non-Party only for the purpose of application of that Amendment."). Hence the double-hull requirement did not ignore U.S. obligations under applicable conventions.

D. Summary.

We have shown that the United States has helped to create, and has ratified and implemented through an extensive body of domestic law, numerous treaties establishing internationally agreed-upon standards to insure maritime vessel safety and environmental protection. The Ninth Circuit has ruled that in § 1018 the United States abandoned its commitment to international consensus and national uniformity and announced its intent to substitute a scheme of potentially conflicting regulation by dozens of individual states and municipalities. Given the United States' history of leadership and support for the international regime, it seems to us inconceivable that such a congressional about-face would not have been reflected either in clear language in the OPA or at least in extensive legislative history. That is especially true in light of the grave consequences of such a congressional decision, a subject to which we now turn.

II

Permitting State Co-Regulation Would Put The United States In Violation Of Specific Treaty Obligations And Have A Profound Adverse Impact On U.S. Foreign Relations And International Commerce.

If the Court of Appeals' interpretation of § 1018 is correct, then Congress has authorized the individual states and their political subdivisions to place the United States in direct violation of international treaty obligations; has seriously undermined the executive branch's ability to exercise its foreign affairs power to achieve international consensus on measures for environmental protection and other purposes; and significantly burdened foreign commerce. A congressional intent to permit these consequences must be clearly expressed. See, *e.g.*, *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("'A treaty will not be deemed to have been abrogated * * * by a later statute unless such purpose on the part of Congress has been clearly expressed.'") (quoting *Cook* v. *United States*, 288 U.S. 102, 120 (1933)).

A. Enforcement Of The Washington Regulations Will Violate Specific United States' Treaty Obligations.

The treaties we have been discussing, and in particular the STCW and SOLAS, establish a specific procedure for implementing and enforcing the standards they set, based on principles of international comity and respect. As we show below, "flag states" are obligated to implement the treaties' substantive requirements, to inspect vessels entitled to fly their own flags, and to issue certificates demonstrating that those vessels and their crews in fact comply with the international standards as implemented. Except in limited circumstances, "port states" are obligated to accept flag state certification that the vessel in question and its crew comply with international standards, and may not detain or interfere with foreign vessels unless specified conditions are met and prescribed diplomatic procedure is followed. As we shall see, by purporting to penalize or exclude vessels that comply with international standards, and by ignoring international protocols, the State of Washington will place the United States in direct violation of its specific treaty obligations.[27]

1. The enforcement scheme under both the STCW and SOLAS establishes clear duties for flag states and for port states, respectively. Flag states must implement the substantive international standards set by the treaties. Thus, Article I of the STCW provides: "The Parties undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the [STCW] full and complete effect, so as to ensure that, from the point of view of safety of life and property at sea and the protection of the marine environment,

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[27] Other Conventions that lend themselves to enforcement through a system of inspections and certificates, specifically MARPOL and the Law of the Sea Convention, set forth similar procedures to the STCW and SOLAS. See MARPOL Art. 5 & Annex I, Regs. 4-8A; Law of the Sea Convention Art. 217, Paras. 1, 3. We discuss only the STCW and SOLAS here because the Washington regulations that the Court of Appeals upheld primarily implicate the standards set and certificates issued under those treaties.

seafarers on board ships are qualified and fit for their duties." STCW, Art. I(2). Flag states must then issue "[c]ertificates * * * to those candidates who, to the satisfaction of the [flag state], meet the requirements for service, age, medical fitness, training, qualification and examinations in accordance with the appropriate provisions of the Annex to the Convention." STCW, Art. VI(1).

Similarly, under SOLAS, the governments that have ratified or acceded to the treaty were required to "promulgate all laws, decrees, orders and regulations and * * * take all other steps which may be necessary to give [the treaty] full and complete effect,"[28] and to periodically inspect vessels flying their flags for compliance with the standards and requirements set forth in the treaty. See SOLAS Annex, Ch. I, Pt. B, Regs. 6(a), 8–10, 12; SOLAS Annex, Ch. IX, Regs. 3–4.

Once the treaties have been implemented and ships and seafarers certified for compliance by the flag states, port states are obligated to accept those certificates except in specifically defined circumstances. The STCW provides that certificates issued by a vessel's flag state "shall be accepted unless there are clear grounds for believing that a certificate has been fraudulently obtained or that the holder of a certificate is not the person to whom that certificate was originally issued," STCW, Art. X(1), or if there are "clear grounds"—as defined in the treaty—"for believing that [international] standards are not being maintained." STCW Annex, Reg. I/4(1.3).

SOLAS similarly provides: "Certificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Governments for all purposes covered by the present Convention," with limited exceptions. SOLAS Annex, Ch. I, Pt. B, Reg. 17; *id.* at Ch. XI, Reg. 4(1).

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[28] This language appears in Article I, Paragraph (b) of SOLAS as enacted in 1974. SOLAS and the Annex thereto have been subsequently amended, and Article I now provides simply that the "Parties to the present Protocol undertake to give effect to the provisions of the present Protocol and the Annex hereto * * *." SOLAS Protocol 1988, Art. I, Para. 1.

2. The treaties strictly limit the control a port state is permitted to exercise over a foreign vessel.[29] The STCW provides that foreign vessels shall be subject to control *only* "by officers duly authorized by [a] Party" to the Convention. STCW, Art. X(1). Regulation I/4 of the STCW Annex then specifies that a port state, acting through a duly authorized control officer, may exercise control over a foreign vessel only for the following three purposes: (1) verification that "all seafarers serving on board who are required to be certificated * * * hold an appropriate certificate * * *";[30] (2) "verification that the numbers and certificates of the seafarers serving on board are in conformity with the applicable safe manning requirements" for that vessel set by that vessel's flag state;[31] and (3) "assessment, in accordance with Section A-I/4 of the STCW Code, of the ability of the seafarers of the ship to maintain watchkeeping standards as required by the Convention if there are clear grounds for believing that such standards are not being maintained * * *."

A port state has "grounds for believing" that international standards are not being maintained only if:

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[29] The limitations would not necessarily prevent a port state from exercising control over a foreign flag vessel for reasons outside the ambit of the treaty. In the absence of the STCW, for example, SOLAS itself—which does not address issues of seafarer qualification and training—might not prohibit the United States from inspecting or detaining foreign ships to determine compliance with applicable standards on those matters. However, all the Washington regulations at issue here address matters squarely within the scope of these two treaties.

[30] Similarly, Paragraph (1) of Article X provides that foreign ships "while in the ports of a Party [are subject] to control by officers duly authorized by that Party to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation."

[31] SOLAS requires contracting governments to establish and maintain measures to ensure that all ships are sufficiently and efficiently manned. SOLAS Annex, Ch. 5, Reg. 13(a).

".3.1 the ship has been involved in a collision, grounding or stranding, or

".3.2 there has been a discharge of substances from the ship * * * which is illegal under any international convention, or

".3.3 * * * routing measures adopted by the [IMO] or safe navigation practices and procedures have not been followed, or

"3.4 the ship is otherwise being operated in such a manner as to pose a danger to persons, property or the environment." STCW Annex, Reg. I/4(1.3).

Deficiencies that might "pose a danger to persons, property or the environment" are defined as: (1) failure of seafarers to hold a valid certificate under the Convention, (2) failure to comply with the flag state's safe manning standards for that vessel, (3) "failure of navigational or engineering watch arrangements to conform to the requirements specified for the ship by the [flag state]", (4) "absence in a watch of a person qualified to operate equipment essential to safe navigation, safety radiocommunications or the prevention of marine pollution," and (5) "inability to provide for [continuous watches by] * * * persons who are sufficiently rested and otherwise fit for duty." STCW Annex, Reg. I/4(2).

In short, as we have seen, the STCW strictly limits the circumstances under which a port state may detain or otherwise interfere with a foreign flag vessel entering its waters.

In addition, under Article X of the STCW, if a vessel is found not to comply with international standards in accordance with its certificate, the control officer must follow a prescribed procedure for addressing those deficiencies. "[A]ll possible efforts shall be made to avoid a ship being unduly detained or delayed," and a vessel "shall be entitled to compensation for any loss or damage" resulting from an undue detention or delay. Art. X(4). As noted above, deficiencies that may be deemed a danger to persons, property or the environment are spelled out in Paragraph 1.3 of Regulation I/4 of the Annex, and are "the only grounds * * * on

which a Party may detain a ship." STCW Annex, Reg. I/4(3). The control officer must "forthwith inform, in writing, the master of the ship and the [flag state's] Consul or * * * diplomatic representative or * * * maritime authority," and specify "the details of the deficiencies found and the grounds on which the Party determines that these deficiencies pose a danger to persons, property or the environment." Art. X(2). If those deficiencies are not corrected, the vessel may continue to be detained, but "the facts concerning the action taken shall be reported promptly to the Secretary-General" of the IMO. Art. X(3).

A parallel control procedure applies under SOLAS: ships are subject to port state control *only* "by officers duly authorized by [a Contracting] Government." SOLAS Annex, Ch. I, Pt. B, Reg. 19(a). Duly authorized officers may exercise control only "in so far as this control is directed towards verifying that the certificates issued [by the flag state] * * * are valid," *id.*, or "when there are clear grounds for believing that the Master or crew are not familiar with essential shipboard procedures relating to the safety of ships." *Id.*, Ch. XI, Reg. 4(1). Again, "all possible efforts shall be made to avoid a ship being unduly detained or delayed," and the control officer must promptly "inform, in writing, the [flag state's] Consul or * * * nearest diplomatic representative * * * of all the circumstances in which intervention was deemed necessary." *Id.*, Ch. I, Pt. B, Reg. 19. Ships are entitled to compensation for any loss or damage incurred as a result of undue detention. *Id.*.

Thus, the STCW and SOLAS provide for a regime in which international standards for (among other things) the management, operation, and staffing of vessels are implemented, and compliance enforced, by the country whose flag a particular vessel flies. Except where there are "clear grounds" for believing that those standards are not being met, other parties to the Convention are obligated to accept that those vessels are sufficiently safe and their crews adequately qualified and trained, and to refrain from delaying or detaining them in their voyages. Any delay or detention of a foreign flag vessel is considered a serious matter

which requires prompt notification to both the IMO and the diplomatic representative of the flag state.

3. In accordance with its treaty obligations in this regard, the United States does in fact recognize foreign certificates as proof of compliance with applicable international (and U.S.) standards, and permits foreign flag vessels meeting those safety standards to enter U.S. ports. Congress has provided that foreign tankers must have a certificate of compliance issued by the Secretary in order to operate on the navigable waters of the United States, which certificate "may issue * * * only after the vessel has been examined and found to be in compliance with this chapter and regulations prescribed under this chapter." 46 U.S.C. § 3711(a). However, "[t]he Secretary may accept any part of a certificate * * * issued by the government of a foreign country under a treaty * * * to which the United States is a party, as a basis for issuing a certificate of compliance." *Id.* Thus, Congress permits the executive branch, in the concurrent exercise of its foreign affairs and domestic enforcement powers, to accept foreign certificates evidencing compliance with international standards in lieu of actually inspecting vessels for compliance with United States' standards. Congress' intention to accept compliance with international standards in place of United States' standards is further evidenced in § 9101 of Title 46, which deals with tank vessel manning requirements and requires the Secretary to determine whether a "foreign country has standards for licensing and certification of seamen that are at least equivalent to United States law *or* international standards accepted by the United States." 46 U.S.C. § 9101(a)(2)(A) (emphasis added).[32]

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[32] In recent years the international community has expressed rising concern and taken action to deal with some governments' repeated failure to comply with their treaty obligations to enforce international standards. Reflecting that concern, the 1990 amendment to § 9101 further provided that, if "the Secretary determines * * * that a country has failed to maintain or enforce standards at least equivalent to United States law or international standards accepted by the United States," the Secretary must exclude vessels certificated by that country unless "the owner or operator of the vessel establishes * * * that the vessel is not unsafe or a threat to the marine environment." 46 U.S.C. § 9101(a)(3) & (4)(A). A few years later, at the direction of the Senate Appropriations Committee, the U.S. Coast Guard launched a Port State Control Initiative to more clearly identify those vessels that might be "substandard" due, among other reasons, to "gross noncompliance with equipment standards or arrangements under U.S. laws or international conventions," or "noncompliance with the operational and/or manning standards required by U.S. laws or international conventions." 59 Fed. Reg. 36,826, 36,827 (July 19, 1994). These efforts to deal with what are essentially chronic scofflaw governments do not reflect diminished U.S. commitment to its treaty obligations.

4. The Washington regulations at issue here fly in the face of the concrete obligations the United States has assumed under the STCW and SOLAS. They purport to assert for the State of Washington authority over foreign vessels that is committed by the treaties solely to a control officer duly authorized by the port state "Administration"—here, the United States Coast Guard. Then, contrary to the United States' obligation to accept the certificates of the other nations as proof that the certificated vessels and their crew will, through compliance with those standards, adequately protect life, property, and the marine environment, the Washington regulations simply ignore the foreign certifications and flatly prohibit entry into Washington state waters of foreign vessels that the state has not independently determined to be safe. Intertanko Pet. App. at 308a.

As a consequence of their failure to respect foreign certifications, the Washington regulations contravene the strict limitations on the control that the United States is permitted to exercise over a foreign vessel under the STCW and SOLAS and permit the state to delay or detain foreign flag vessels despite the lack of any "clear grounds" for believing that international standards are not being maintained. Finally, the Washington regulations permit the state to interfere with a foreign flag vessel's passage without following the careful diplomatic procedures prescribed by the treaties. In all of these respects, enforcement of the Washington regulations would place the United States in direct violation of its treaty obligations to foreign governments.

When previously faced with state law that interfered with the policies and obligations set forth in an international agreement, this Court has not hesitated to hold that the state law "must yield". See, *e.g.*, *United States v. Pink*, 315 U.S. 203, 230–31 (1942). There the Court noted:

> "[T]he field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority' * * * . * * * If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power." *Id.* at 232 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941)).

The difficulties the Court foresaw in *Pink* are concretely presented by this case: if the Ninth Circuit was correct in its interpretation of § 1018, it is not just the STCW and SOLAS obligations that are in jeopardy, and not just the State of Washington that may cause violations for which the United States will have to answer. Any one of the twenty-three coastal states of the United States—and their political subdivisions—may then enact maritime regulations that violate these or other provisions of the dozens of international treaties, agreements, and protocols governing maritime issues to which the United States is party, creating diplomatic incidents and the potential for retaliation and/or reparation obligations. It is difficult to believe that Congress intentionally permitted such a result.

B. State Co-Regulation Would Undermine The United States' Foreign Affairs Power.

In addition to sanctioning the potential violation of international treaties, giving each of the coastal states and their political subdivisions the authority to enact and enforce their own regulations governing the operation and staffing of foreign flag vessels would undermine the United States' ability to continue to seek (and to achieve) international consensus on stricter maritime standards. As an active participant in the IMO since its founding,

the United States has been instrumental in bringing the vast majority of maritime nations to agreement on a comprehensive set of standards, embodied in a handful of principal treaties and a host of other protocols and conventions, that protect the marine environment and the safety of life and property at sea. Over time, through amendments and additions to the various treaties, these standards have become stricter and more detailed. Yet the IMO's and United States' work is far from completed. To cite just one current example, the United States is working through the IMO to obtain international agreement on the double-hull requirement for tankers that Congress enacted into U.S. domestic law in 1990. See 46 U.S.C. § 3703a.

The United States' credibility in this arena and the success of its efforts depend largely on its ability to speak with one voice and to demonstrate its own willingness to abide by and support the standards it recommends to the rest of the world. As Congress noted in legislative history accompanying the Coast Guard Authorization Act of 1996:

> "As a matter of Constitutional law, the Federal Government has responsibility for requirements pertaining to vessel structure, design, equipment, and operation. * * * Federal uniformity in these matters is critical * * * because the absence of uniformity hinders the United States' ability to seek increased international vessel standards to better protect the environment." H.R. Conf. Rep. No. 104-854 (1996), *reprinted in* Intertanko Pet. App. at 268a.

See also U.S. Pet. at 14 & 27–28 (noting the grave impact of the Ninth Circuit's decision on the United States' ability to negotiate and achieve results in the international maritime community).

In the end, if the United States' role in the IMO is undermined by the ability of states and municipalities to go their own way, maritime safety and environmental protection around the world may suffer.

C. State Co-Regulation Could Seriously Burden Foreign Commerce.

Permitting the several states and their political subdivisions directly to regulate the operation and crew competence of foreign vessels and the qualification and training of foreign seafarers could create a tremendous burden upon the maritime industry and international commerce. See *American Dredging Co.* v. *Miller*, 510 U.S. 443, 466–67 (1994) ("'The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. * * * [T]he Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control.'") (Kennedy, *J.*, dissenting, quoting *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924)). Vessel owners would have to comply not only with international and United States' standards, but with the separate, higher, and perhaps conflicting standards of all twenty-three coastal states and their political subdivisions. This would impose a substantial operational burden upon shipping companies and would ultimately redound to the disadvantage of the public.[33]

D. Summary.

If the word "requirements" did not appear in § 1018, it would have been impossible for the Ninth Circuit to have ruled as it did. It seems to us equally impossible, based on that one word alone, and in the absence of *any* supporting legislative history, to conclude that Congress intended thereby to reallocate federal/state powers over maritime safety and environmental protection, invite treaty violations, and damage the standing of the United States in the international maritime community. The numerous indicia of congressional intent mentioned above (see pp. 4–6, *supra*), along with what we have just demonstrated would be the grave

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[33] The Court of Appeals erroneously focused solely on the purported cost of complying with the Washington regulations at issue, see U.S. Pet. App. at 33a, without considering that its decision would also subject the international shipping industry to the costs of every other independent regulation that one of the states within its jurisdiction might enact.

consequences of an alternative reading, show that the proper interpretation of "requirements" in § 1018 is limited to financial responsibility requirements, not vessel operating and crew competence requirements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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